LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP 26 1956
JOHN T. FEY, Clerk

NO. 60

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956

ROBERT W. JAFFKE, Petitioner

v.

WILLIAM C. DUNHAM, Trustee of the Estate of ROBERT L. KNETZER, Bankrupt, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

---

BRIEF FOR RESPONDENT

G. W. HORSLEY
and
L. H. LENZ
408 East Adams Street
Springfield, Illinois
Attorneys for Respondent

SCHNEPP & BARNES, PRINTERS, SPRINGFIELD, ILL.

INDEX

	Page
Table of Cases	ii-iii
Opinion Below	1–2
Questions Presented	2
Statement	3–14
Summary of Argument	14–17
Argument:	
I. The Court of Appeals did not erroneously refuse to consider Appellee's contentions in support of the verdict of the trial court	17–25
II. The judgment of the District Court should not be affirmed but the decision of the Circuit Court of Appeals should be affirmed	26–33
III. A trustee in bankruptcy does not have a duty to investigate the source of payments made to him in compliance with the turn-over order	33–40
IV. Petitioner's allegation that the Respondent may not profit from his failure to make the necessary inquiry demanded by the circumstances of this case is without merit	40–44
V. In a reclamation proceeding the burden of tracing funds is upon the Petitioner because the possession of property by the Trustee raises a presumption of ownership and the claimant must overcome this presumption by clear, convincing and unequivocal evidence	44–48
VI. Before the Petitioner could recover in this matter it was incumbent upon him to establish a constructive trust by sustaining his burden of proof with evidence which was so clear and convincing, and so strong, unequivocal and unmistakable as to lead to but one conclusion	48–53
VII. The Petitioner was not a competent witness in his own behalf in this proceeding, under the statutory law of Illinois	53–58
Conclusion	59

Page

TABLE OF CASES

Cases Cited in Support of Respondent's Position:

Board of Commissioners v. Strawn, 157 Fed. 49, 84 CCA 553 47

Bundesen v. Lewis, 368 Ill. 623, 15 N.E. 2d 520 51

Chain O'Mines v. United Gilpin Corporation, 109 Fed. 2d 617, CCA 7th, 1940, cert. den. 61 S. Ct. 14, 311 U.S. 659 ..... 48, 49

Columbia Casualty Co. v. Thomas, 101 Fed. 2d 151 .. 30, 31

Cook v. Korshak, 301 Ill. 603, 134 N.E. 49 27

Dickinson v. Dickinson, 305 Ill. 521, 137 N.E. 468... 51

Grand Trunk Western R. Co. v. Chicago & Western Indiana R. Co., 131 Fed. 2d 215, CCA 7th 49

In Re A. D. Matthews & Sons, CCA 2nd, 238 Fed. 785 47

In Re Harigan Supply Co., CCA 8th 1924, 2 Fed. 2d 791, p. 792 ..... 46, 47

In Re Haynsworth, 34 Fed. 2d 334 ..... 29, 30

In Re Shaw, 109 Fed. 780, District Court for the Eastern District of Pennsylvania, 1901 ..... 56, 57

Jacoby v. Shell Oil Co., 196 Fed. 2d 855, CCA 7th ... 49

John Deere Plow Co. v. McDavid, CCA 8th, 1905, 137 Fed. 802 47

Johnston v. Shockey, 335 Ill. 363 49

Karpathiou v. Schlotfeldt, 106 Fed. 2d 928 30

Lakeshore National Bank v. Bellanca Aircraft Corp., 83 Fed. Supp. 795, affirmed 178 Fed. 2d 923, CCA 3rd, 1950 54

Milling v. Hillenbrand, 156 Ill. 310, 40 N.E. 941 27

M'Iver v. Kyger, 3 Wheat. U.S. 53 29

Morel v. Masalski, 338 Ill. 41, 164 N.E. 205 ..... 50, 51

Myers v. Kinzie, 26 Ill. 36 28

Page

National Waste Co. v. Spring Packing Corp., 200 Fed. 2d 14, cert. den. 345 U.S. 509, CCA 7th 49

Pandolfo v. U.S. 286 Fed. 8, cert. den. 261 U.S. 621 30

Potlatch Oil and Refining Co. v. Ohio Oil Co., 199 Fed. 2d 766, CCA 9th, 1952 54

Rankin v. Cox, 71 Fed. 2d 56, CCA 8th 1934 ..... 55, 56

Ray v. Salisbury, 134 N.Y. Supp. 733, 1911 ..... 57, 58

Roda v. Berko, 401 Ill. 335, 81 N.E. 2d 912 ..... 49, 50

Rosenbaum, et al. v. Huebner, et al., 277 Ill. 360, 115 N.E. 558 51

Schuyler v. Littlefield, 232 U.S. 707 ..... 45, 46

Stevens v. Howells Sales Co., 16 Fed. 2d 805 30

United States Fidelity & G. Co. v. Commercial Nat. Bank, 55 Fed. 2d 564 30

Vendetti v. U.S., 45 Fed. 2d 543 30

Whitmore v. Murdock, 29 Fed. Cases No. 17,509 29

Wright v. Wilson, 154 Fed. 2d 616, CCA 3rd 1946. Cert. den. 329 U.S. 743 54

STATUTES

"Competency of Witnesses Act," 34 Stat. 618, R.S. Sec. 858, 28 USC 631 54

Order No. 37, General Orders in Bankruptcy, effective February 13, 1939 54

Section 2, Chapter 51, Illinois Revised Statutes, Bar Assn. Edition 1953 ..... 54, 55

Section 322, Title 28, Purdon's Pennsylvania Statutes, 1936 57

TEXTBOOKS

53 ALR 650—Admissions by Bankrupt or Insolvent 29

6 American Jurisprudence, page 1265, Section 1192.. 28

Page

20 American Jurisprudence, page 518, Section 604 .. 29

Collier on Bankruptcy, 14th Edition, Vol. 2, Sec. 21.10, Competency of Witness Other Than Spouse of Bankrupt 54

5 Moore Federal Practice, Sec. 43.06, page 1330.31 .. 54

Remington on Bankruptcy, 5th Ed. 1953, Sec. 2480, Vol. 5A pages 291, 292 45

Remington on Bankruptcy, 5th Ed. 1953, Sec. 2493, Vol. 5A, page 308 45

Cases Cited by Petitioner and Discussed by Respondent:

Aberly v. Craven County, 70 Fed. 2d 52 4th (Cir. 1934) 23

Avery v. Cleary, 132 U. S. 604 (1890) 36

Corning v. Troy Iron & Nail Factory, 56 U. S. 451, 14 L. Ed. 768 (1853) 24

Dausch v. Barker, et al., 329 Ill. 410, 160 N. E. 765 .. 28

Electrical Fittings Corp. v. Thomas & Betts Co., 307 U. S. 241 ..... 24, 25

Harding v. Federal National Bank, 31 Fed. 2d 914 (1st Cir. 1929) 22

Illmon v. Kruse, 301 Ill. 408, 134 N. E. 107 ..... 27, 28

Langnes v. Green, 282 U. S. 531 (1931) 21

Lanova Corp. v. National Supply Co., 116 Fed. 2d 235 (3rd Cir. 1940) 22

Lindheimer v. Illinois Bell Teleph. Co., 292 U. S. 151 (1934) 24

Mach v. Abbott Co., 136 Fed. 2d 7 (8th Cir. 1943); cert. den. 320 U. S. 773 23

Maggio v. Zeitz, 333 U. S. 56 ..... 36, 37

Morley Constr. Co. v. Maryland C. Co., 300 U. S. 185 (1937) 22

Ottenheimer Bros. v. Libuwitz, 74 Fed. 2d 858 (4th Cir., 1935), cert. den. 296 U.S. 582 23

	Page
Schell v. Weaver, 225 Ill. 159, 80 N. E. 95 (1906)	26
Schwartz, In re, 89 Fed. 2d 172 (2nd Cir. 1937)	22
United Engineering and Foundry Co. v. Cold Metal Process Co., 68 Fed. 2d 564 (3rd Cir. 1934), cert. den. 291 U. S. 675	23
United States v. Adamant Co., 197 Fed. 2d 1 (9th Cir. 1952), cert. den. 344 U. S. 903 (1952)	23
United States v. American Ry. Exp. Co., 265 U. S. 425 (1924)	24
Zartman v. First Nat. Bank, 216 U. S. 134 (1910)	36

NO. 60

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956

ROBERT W. JAFFKE, Petitioner

v.

WILLIAM C. DUNHAM, Trustee of the Estate of ROBERT L. KNETZER, Bankrupt, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

---

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the U.S. Court of Appeals, at R. 185, does not reflect the original opinion of the Court issued on January 13, 1956, but represents the opinion as amended after the order of February 13, 1956. The last two paragraphs of the original opinion, as shown at page 7 of said original opinion, are as follows:

> "The judgment is Reversed and the cause remanded for further proceedings consistent with the views expressed in this opinion.
>
> "Schnackenberg, Circuit Judge, concurring. I concur in the foregoing opinion, with the exception that I

believe the judgment should be reversed and there is no need for a remandment. Upon the hearing in the district court both parties had an opportunity to, and did, offer evidence which they considered relevant to all issues presented there and later in this court. There is no occasion now for a further hearing. Both sides have had their day in court."

Thereafter, the opinion was amended as printed at page 185, in accordance with the order of the Court dated February 13, 1956, shown at R. 202.

QUESTIONS PRESENTED

Can the Court of Appeals consider adverse rulings of the trial court where no cross-appeal is taken and where to do so would enlarge the rights of the party not cross-appealing?

Even if we assume for the sake of argument that the Circuit Court of Appeals erred in not considering the rejected evidence since no cross-appeal was taken, was it merely harmless error since the evidence was not admissible in the first place?

Is an ex parte affidavit admissible under the conditions as presented in the instant case?

In a reclamation proceeding is the burden of proof upon the Petitioner to prove a constructive trust by evidence which is so clear and convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion?

In a reclamation proceeding where property is in the possession of the Trustee is there a presumption of ownership in the Trustee, and is the burden upon the Petitioner to overcome such presumption by proof that is clear, convincing and unequivocal?

Was the Petitioner a competent witness in his own behalf under the evidence law of the State of Illinois?

STATEMENT

The Turn-Over Order

(For the sake of clarity we shall try to follow the sub-headings used by Petitioner in his brief.)

The turn-over order of Judge Charles G. Briggle, entered July 11, 1949 (R. 144) found that the Bankrupt had in his possession or under his control the sum of $250,000.00, which should be turned over to the estate as a part of the assets belonging to said bankrupt estate, at the time of the filing of the petition in bankruptcy herein. The Bankrupt was forthwith ordered to pay to the Trustee the sum of $250,000.00. It is significant to note that the turn-over order recites the taking of testimony before the entering of the same. There was no appeal taken from the turn-over order and it became final, nor was there any valid attempt on the part of the Bankrupt to be purged from contempt.

The statement by Petitioner that the Bankrupt was allowed freedom to obtain sufficient assets to comply with the turn-over order is not correct. The Circuit Court of Appeals stated in its opinion (R. 181) . . . "This permission was granted on Knetzer's promises that he could and would use his freedom to procure the required $250,000.00 and thereby purge himself of contempt."

The record (pp. 77-82) does show that the Bankrupt made payments at various times, but the statement of Petitioner that such payments were made "in effect buying further freedom from imprisonment" is not a proper conclusion to be drawn from such evidence.

The time element during which the Petitioner claims to have advanced money to the Bankrupt runs from December 7, 1950 to October 27, 1951, during which time the Peti-

tioner claims he advanced to Knetzer the sum of $47,980.00, all as is more fully shown by the chart set forth in the Argument. The testimony of Ralph Riley was that he had advanced $32,389.00 to Knetzer during the period from June 28, 1950 to September 19, 1950. (R. 140-3.) Clint Petty testified that he advanced to Knetzer the sum of $44,000.00 during the period from April 14, 1951 to June of 1951, (R. 138-140) and it was stipulated that Gerald Sammons advanced to Knetzer, between November 1, 1951 and February 1, 1952, the sum of $101,550.00. Saul Cohn testified that he was an attorney, but he was never asked whom he represented, and that during the period from April 14, 1951 to November, 1951 he paid $70,000 to the Trustee, some of which he received from Robert Knetzer and some from other people. More from Knetzer than anyone else, and that he did not know where Knetzer got the money. (R. 134-135.)

Fraud on Petitioner?

On page 5 the statement by Petitioner, that the Bankrupt stated that he had agreed to make the payment to the Court under duress, is not contained in the record. Such evidence was given by petitioner, and upon objection this statement was stricken by the trial court. The record does not disclose that the Bankrupt ever signed any statement or any agreement in connection with the turn-over order. The testimony of the Petitioner was that the Bankrupt informed him that he had to pay $5,000.00 into court at once, rather than that he needed $3,800.00 additional money to pay into court. (R. 53.)

Petitioner makes the flat statement, on page 5, to the effect that the Bankrupt was never in custody. However, he testified that he had read in the newspaper that the Bankrupt was in the custody of a Marshal and that the

Bankrupt replied that it was all paper talk and was not true. Petitioner offered his Exhibit 29, which was ordered stricken by the trial court, but is one of the matters which has been urged by the petitioner, and used by him in his brief, and if this Court sees fit to consider said Exhibit 29, attention is called to the Record at page 205 where the Honorable Charles G. Briggle pointed out to the Bankrupt that he would have to reimburse the United States Treasury for the salary of the U. S. Marshal "while he has been engaged in taking you about from place to place, and Mr. Doyle has suggested that the figure would probably be $10,000.00." The Bankrupt agreed to that repayment.

The statement on page 5 that payments were made by Petitioner to the Bankrupt as further investments in the Bison Company is contrary to the exhibits offered by Petitioner and is more fully discussed in the Argument.

We believe that Petitioner has omitted the following facts which are material in connection with his contention.

Petitioner testified in substance that he was an insurance broker in St. Louis, Missouri; that he had handled loans daily and weekly since 1939 (R. 41); that he borrowed from individuals and built houses; that he was represented by a law firm that handled his title work and other legal matters (R. 115); that in June of 1947 he deposited $1,300.00 with Knetzer on an automobile; that in April of 1948 he made another deposit on an automobile; that in March of 1948 he deposited $3,000.00 on three tractors and in April of 1948 he deposited $7,000.00 on seven more tractors. He expected to sell these tractors and make a profit on them. In October of 1948 he learned of the bankruptcy and he employed attorneys to try to collect the money for him and they filed a claim in bankruptcy court for $11,300.00. (R. 44.)

Petitioner admitted that in January, 1950 he received Respondent's Exhibit 1 (R. 161) through the mail, which in effect told him that the estate was hopelessly insolvent, that the total claims filed amounted to nearly $4,000,000.00, consisting of 535 claims, in addition to a Federal Tax claim for $2,226,000.00, and that said Exhibit further informed him that the Bankrupt was under a turn-over order to pay to the Trustee the sum of $250,000.00 and that only a small portion of it had been paid. (R. 117.)

On December 6, 1950, Petitioner contended that the Bankrupt called him on the telephone and he met him at the Sheraton Hotel in St. Louis. He said that the Bankrupt told him that he had formed a corporation known as the Bison Mining and Development Company, and that he himself was just the manager but he had an influential man who was arranging a loan for the corporation in order to build houses at an Air Force Base near Great Falls, Montana. He further said the Bankrupt told him that he had considerable expense and couldn't operate sooner because of a huge government tax lien against him. Petitioner noticed that he wasn't in the custody of the Marshal, and asked him about it, and the Bankrupt said that it was just paper talk and that all he had to do was just to report every few weeks. Petitioner met him the next morning, said he believed the representations and gave the Bankrupt $2,300.00. That was on December 7, 1950. He again gave money to the Bankrupt a second time on that same afternoon and Petitioner said:

> "I took the first payment with me and went up to an office of a man named John Snyder. He represented Mr. Snyder as being his accountant and tax man and also interested in this particular deal. Knetzer himself went into the office of Mr. Snyder, and I stayed outside in the waiting room, and after some time, sup-

posedly twenty minutes or so, he came back out and we went downstairs and he said that Snyder had given him some bad news. I said, 'Now what?' He said the court was requesting a payment of $5000.00 which would have to be paid at once. * * * * * it was a payment to be made to the court on his bankruptcy account of some $250,000.00 and which he had agreed to turn into court." (R. 51-53.)

The Petitioner admitted that he had discussed with the Bankrupt his agreement to pay the $250,000.00 turn-over order to the Trustee. The second payment on that date was $3,800.00, making a total of $6,100.00 on December 7. On December 10, 11 and 12 he met the Bankrupt at the Airport in the company of Ralph Riley, whose name the Bankrupt had previously given to him as a member of the corporation. (R. 57.)

Petitioner said that the Bankrupt needed additional assets to show in the corporation to help get the loan approved and wanted $12,500.00. (R. 59.) Petitioner testified that he borrowed that sum and turned it over to the Bankrupt. On December 17, 1950 he again met the Bankrupt, who said he needed $7,500.00 in connection with the building of these houses. Petitioner then conferred with Ralph Riley, who informed him that he had money in the deal, too. He testified he then borrowed the money, turning it over to the Bankrupt on December 18th, and again on December 22nd gave him $9000.00. On January 3rd he advanced $6000.00 to the Bankrupt, because the Bankrupt needed more money on the transaction and there was again additional money needed in the assets of the corporation for the approval of the loan. On January 8th the Bankrupt said he needed additional money for attorneys' fees and he gave him $1000.00. On March 14, 1951 he gave the Bankrupt $520.00 and $260.00 on May 21, 1951.

He did not see the Bankrupt again until August, 1951, when the Bankrupt was in a hospital because of an automobile accident and he advanced him $300.00 for phone calls. In October of 1951 he advanced $4800.00. (R. 113.)

Petitioner put in evidence a note payable to him signed by the Bankrupt, dated December 6, 1950, payable to R. W. Jaffke, in the amount of $7000.00, due December 6, 1951, with interest at 8% (R. 160), but he testified that the note was actually given in March of 1951, a few days after the Bankrupt got out of jail, since the Bankrupt had gone to jail in January a few days after he had secured $7,000.00 from him (R. 114). Petitioner also put into evidence his Exhibit 28, being a receipt dated December 22, 1950, showing that Knetzer received from Petitioner the sum of $35,100.00. Said receipt recited, "Date Dec. 22, 1950, Received of Robert W. Jaffke Thirty-five thousand one hundred dollars ($35,100.00), money loaned to me in cash, to be accounted for by December 28, 1950" signed by Robert L. Knetzer. (R. 160.)

Petitioner admitted that he had title to the Bankrupt's 1951 Cadillac as security for the $4800.00 paid in October, 1951, which he surrendered upon payment of $2800.00. (R. 127.)

Petitioner admitted that he had been in the real estate and investment business since 1939, had built houses; that he never looked at the books and records of the corporation; that he knew one of the incorporators was Ed Kane of Edwardsville, yet he never talked to him; that he knew the Bankrupt was not a member because of his bankrupt condition and that anything that he was connected with would stand too much investigation about concealing assets. That conversation took place on December 6, 1950, before he had given him any money. Petitioner testified that he

did not intend to purchase any stock in the corporation, but only intended to invest money in the project with the hope of making a 50% profit like he did in another deal. (R. 117.)

Petitioner admitted that he knew that the Bankrupt was under an order to turn over to the Trustee the sum of $250,000.00. The Petitioner had met Riley in March of 1951 and knew that Riley was very much disgusted with the dealings he had had with the Bankrupt. He knew that Riley was having trouble in March of 1951. Petitioner stated that $3800.00 of the first $6100.00 which he gave to the Bankrupt on December 8, 1950 was for the purpose of paying on the turn-over order. He admitted that when the Respondent took his deposition prior to trial, in response to the question, "How was that $6,100.00 to be repaid to you?" and he answered, "He was to get it back to me when he got it from another individual later." Petitioner admitted that he had read in the newspapers of the Bankrupt's schemes of buying cars to re-sell and paying $1000.00 more for the cars than what he got for them, that he did not ask the Bankrupt how much money he had paid on the turn-over order when he talked to him.

Petitioner admitted seeing Clint Petty hand a sack to the Bankrupt on May 28, 1951, with a large amount of money in it.

Petitioner expressly stated that the $4800.00 given to the Bankrupt in October of 1951 was on the basis of security of an automobile as, "I had realized this man could not be trusted," and he later gave the title of the car back to the Bankrupt's wife and released it upon the payment to him of $2800.00. (R. 127.)

Petitioner testified that as far as he knew, he did not know what was done with the money that he gave to the

Bankrupt and he did not know whether there was some oil or timber properties presently held by the Bankrupt.

The Petitioner put on as his witness Attorney Saul E. Cohn who testified that from April 14, 1951 to November, 1951 he paid to the Trustee approximately $70,000. Some of the money came from Knetzer and some from other people and he did not know where Knetzer obtained the money. He only saw Petitioner Jaffke one time, but he never knew his name until today, that one time when Mr. Knetzer was in his office, Mr. Jaffke was there with him, but he was not present at any time when Knetzer turned money over to him.

In the month of February, 1953 the Petitioner testified as a witness for the Bankrupt while he was on trial for concealing assets, which resulted in his conviction, and he was asked by the attorney for the Bankrupt, "Since October 5, 1948, have you loaned any money to Robert Knetzer?" and Petitioner answered, "Yes, Mr. Knetzer received the sum of $47,980.00 from me." (R. 123.)

He did not file any subpoena or claim a witness fee or mileage. (R. 122.) He brought the Bankrupt's wife up to the jail to visit him every few days and during the trial which lasted about 3 weeks in February, 1953 he drove the Bankrupt back and forth from St. Louis to Springfield every day, and claimed that the Bankrupt still owed him for those expenses. (R. 132.)

Bankrupt's Admissions

Petitioner's statement that he first learned in the Spring of 1952 that the Bankrupt had not used the money for the Bison Mining and Development Company is not correct. His own testimony showed that he knew the first money was to be used on the turn-over order and he gave the

Bankrupt money while he was in the hospital for calls and expenses and he heard him make those phone calls. (R. 124.) He loaned the Bankrupt $4,800.00 after he claimed he realized the Bankrupt could not be trusted, took a mortgage on the Bankrupt's cars and claimed that money was to be used for a Christmas tree project. (R. 127-9.)

During the period of his dealings with the Bankrupt, the Bankrupt was working on the corporation deal but he did not know how much money the Bankrupt had put into the corporation deal and had no personal knowledge as to what had happened to the money. (R. 126.)

Petitioner's Exhibit 24 is the affidavit mentioned on page 6, which was stricken by the Court as not being admissible. Contrary to Petitioner's statement that R. W. Heintz was the Bankrupt's attorney, Heintz testified that he came to Springfield for the purpose of interviewing the Bankrupt, to determine whether his office would represent the Bankrupt. He went to Mr. William Giffin's office, who had represented the Bankrupt, and there met Mrs. Knetzer at that office. As he entered the jail to interview Knetzer the Petitioner handed him the affidavit which had already been prepared and he obtained the signature of Knetzer before a Notary Public. (R. 103-5.) Said Exhibit contains a recital that the Bankrupt "borrowed" the money from Petitioner. (R. 203.)

Petitioner's Suit

Petitioner's statement that the Respondent never had any evidence that payments were made from concealed assets, on page 7, does not quite reflect the true situation. Respondent was asked as to whether or not he referred these matters to the Federal Bureau of Investigation and the Court sustained an objection requiring him to tell of his activities in connection with the F. B. I. (R. 93.)

In response to the question as to whether or not he had any evidence that payments were from concealed assets the Respondent answered, "No, no absolute knowledge." (R. 94.) Petitioner's statement that Respondent knew that the Bankrupt was out of jail not in the custody of a Marshal is misleading. Respondent made a distinction between actual and technical confinement and that as far as he knew the Bankrupt came to his office alone and that he was not in actual custody so far as he knew.

It would take a volume of printing to show the inaccuracies contained in the third paragraph on page 7, but only a reading of pages 84, 90-91, 38-39 would show up these inaccuracies.

On page 8 Petitioner refers to his answer to the motion to modify the Court's opinion filed by the Petitioner in the Circuit Court of Appeals, which is not any part of the evidence in this case.

However, since Petitioner has brought up the matter, so that there will be no misunderstanding, we cannot help but refer to page 193 of the Record. Petitioner has attempted to make it appear that that was an official trustee's account, with the deductions of Petty's payments, etc., which is not at all correct. Likewise, his statement that Knetzer was confined in jail on January 16, 1951 and released on March 5, 1951 is not found at page 78 of the record nor is it anywhere in the record. An examination of the charts will refute Petitioner's claim, because the chart shows that Riley paid Knetzer $11,050.00 between June 28, 1950 and August 2, 1950, and yet Knetzer made 2 payments, to-wit, July 28, 1950, of $9,315.00, and August 2, 1950, of $8,000.00, making a total of $17,350.00 prior to the time it is contended that Riley gave him any more money. Therefore, it cannot be contended that this was

all Riley's money. Said chart further disregards the testimony of Attorney Saul Cohn; that only part of the money that he paid to the Trustee came from Knetzer, the rest of it came from other persons.

The Decision of the Court of Appeals

We do not believe that Petitioner's statement on page 9, that the Court of Appeals sustained the finding of the lower court that the Bankrupt had defrauded the Petitioner of $47,980.00 is a correct statement. The Court of Appeals, in its opinion, said:

> "But Petitioner's proof that he had been so defrauded by Knetzer was not enough to establish the preference he sought over the other creditors.
>
> "Most of the claimants in this bankruptcy matter had also been defrauded by Knetzer's representations that he would sell and deliver to them automobiles and tractors which Knetzer knew he could not deliver. But by these representations Knetzer induced them to make large deposits on the purchase price of automobiles and tractors which they ordered. Jaffke himself had been so defrauded by Knetzer to the extent of $11,300.00, for which Jaffke's attorneys filed for him a general claim with the trustee in bankruptcy.
>
> "But in the instant proceeding Jaffke claims that since Knetzer, after he had been adjudged a bankrupt, procured the amount of $47,980.00 from him by fraud and then paid $36,000.00 of that amount to the trustee, the money so paid did not become the property of the trustee because it was impressed with a trust in favor of the Petitioner. Thus, argues the Petitioner, he is entitled to recover the amount of $36,000.00 from the assets in the hands of the trustee.
>
> "To support his claim on this theory it was just as necessary for the Petitioner to prove that the $36,000.00 was paid (fol. 184) to and became a part of the funds in the hands of the trustee as it was to

prove that Knetzer had procured this money by fraud. This we think the Petitioner has failed to do. . . ." (R. 182-183.)

SUMMARY OF ARGUMENT

I.

Where an appeal is taken by the losing party, the victorious party may urge the reviewing court to consider matters erroneously decided or overlooked by the trial court without a cross-appeal, only if the victorious party received all that he was seeking in the trial court and if to do so will not enlarge his rights and diminish the rights of the appellant. In the instant case the Petitioner brought suit against the Respondent claiming $36,000.00, but the trial court in its findings of fact and conclusions of law found that he was only entitled to $27,400.00. Petitioner's theory of the suit is based upon a constructive trust because of fraud. He offered an affidavit of the Bankrupt to prove his claim for $36,000.00, which was stricken by the trial court and which showed upon its fact that it represented money "borrowed" from Petitioner. The Circuit Court of Appeals refused to consider the affidavit because no cross-appeal was taken. Therefore, to consider said affidavit would amount to Petitioner urging a new theory in the case and, if admissible, might entitle him to judgment for $36,000.00 rather than $27,400.00. If same were admissible it would require a change of a finding of fact by the trial court and would thus enlarge the rights of the Petitioner without a cross appeal, contrary to the applicable case law.

II.

Shortly after bankruptcy the District Court ordered the Bankrupt to turn over to his trustee the sum of $250,000.00, which the Court found the Bankrupt had

in his possession or under his control at the time of bankruptcy. The turn-over order was not appealed and the Bankrupt was never purged of contempt. The only proof of tracing which Petitioner offered, but which was excluded by the trial court, was an affidavit by the Bankrupt that he had borrowed $36,000.00 from the Petitioner, which he gave to his trustee to apply on the turn-over order. This affidavit was not admissible as an admission against interest, both under the case law of the State of Illinois and the decisions of this Court. Neither was it admissible as an *ex parte* affidavit for the same reasons, and more particularly, because the admissions of the Bankrupt could not be used to defeat the title of his trustee. Since the Circuit Court of Appeals had held that the Petitioner had not proven such fraud as to impress the funds with a constructive trust, which would give him a preference over other creditors, and since he had not proven any tracing of the funds to the Trustee, the decision of the Circuit Court of Appeals was correct in entering judgment for the Respondent.

III.

A trustee in bankruptcy does not have a duty to investigate the source of payments made to him in compliance with a turn-over order. The Trustee had a duty imposed upon him by the Court order, which he fulfilled by having the Bankrupt cited for contempt of court and imprisoned. The fact that the Bankrupt was released from jail by order of the Court, so that he could comply with the turn-over order, does not require the Trustee to investigate the source of such payments to comply with said order.

IV.

The instant case is not similar to cases where a bankrupt operates a business under a re-organization or as a debtor

in possession or where a trustee operates the business and commingles tax moneys with bankrupt assets, where such tax moneys are impressed with a trust by virtue of statute.

Where other persons loaned or gave money to the Bankrupt for the purpose of paying on the turn-over order, such persons cannot complain. Where the Bankrupt borrowed money from other persons and the Bankrupt used some of these funds in lieu of his concealed assets to make payment on the turn-over order, such funds are not impressed with a trust. Where the Bankrupt borrowed more than $225,000.00, but only paid $79,000.00 to his trustee on the turn-over order, without any proof of tracing of the funds, Petitioner cannot recover.

V.

In a reclamation proceedings the burden is upon a petitioner and he can only establish his case by evidence that is clear, convincing and unequivocal, to overcome the presumption of ownership by the trustee. This burden never shifts to the trustee, and where the facts indicate that the Petitioner has failed in his proof of tracing, the Respondent must prevail.

VI.

The evidence on the part of a petitioner in a reclamation proceeding, seeking to establish a constructive trust, must be of such character that it is clear, convincing, unequivocal and unmistakable and can only lead to but one conclusion. The Circuit Court of Appeals found that the Petitioner had not so proven his case and under the applicable law the facts show that he has not established a constructive trust.

Likewise, the Petitioner must show diligence upon his part and act as a prudent man would act under the circumstances. The evidence in this case indicates that the

Petitioner did not so act; that he had knowledge of fraudulent activities on the part of the Bankrupt prior to bankruptcy; that he had knowledge of the turn-over order, giving money to the Bankrupt to apply on the turn-over order; that he was in league with the Bankrupt in *sub rosa* business activities, helping the Bankrupt to conceal such activities from his trustee, attempting to invest money in such activities with the hope of making a large profit and therefore, cannot recover.

VII.

The Bankrupt was dead at the time of the hearing in this matter, leaving surviving heirs and the Petitioner was not a competent witness in his own behalf by virtue of the Evidence Act of the State of Illinois. Since the Bankruptcy Court is bound by the rules of evidence of Illinois, the trial court erred in allowing the Petitioner to testify in his own behalf.

ARGUMENT

(In replying, we shall first try to refer to the headings as used by Petitioner.)

I. The Court of Appeals did not erroneously refuse to consider Appellee's contentions in support of the verdict of the Trial Court.

The opinion of the Circuit Court of Appeals is a somewhat unusual opinion in that it does not rely upon any case law, there being no cases cited therein, but is based upon an analysis of the facts and the inferences to be drawn from those facts.

To begin with, the Court found from the facts that the Petitioner had not proven such fraud which would give him a preference over the other creditors. The Court

then found specifically that the Petitioner had not proven any tracing of funds, which he must do just as much as he must prove a fraud which would raise a constructive trust. It is also significant to note that Judge Schnackenberg in the original opinion, concurred specifically in the opinion, but added:

> "Upon the hearing in the District Court both parties had an opportunity to, and did, offer evidence which they considered relevant to all issues presented there and later in this Court. There is no occasion now for a further hearing. Both sides have had their day in court."

After that opinion, in response to Respondent's motion to modify the opinion, the Petitioner filed a long answer which was more or less in the nature of a brief, urging upon the Court the proposition that it should consider the affidavit and citing authorities that the Court could consider the same without the necessity of a cross-appeal. (R. 190.) Thereafter, the Court modified its opinion and struck from it the remandment for further proceedings, consistent with the views expressed in the opinion, and entered judgment for the Respondent.

It is thus obvious that the Court did consider fully the theories advanced by the Petitioner, although it is true that it did not correct that part of the opinion which mentioned that no cross-appeal had been taken. It is also obvious from the opinion that the Court did consider, not only the affidavit, but the transcript of record which was likewise stricken by the trial court, as it is mentioned in detail in the opinion.

However, we do not believe that too much emphasis should be placed upon this particular point in view of our belief that the affidavit was not admissible in the first place and further, in view of the fact that the Petitioner

has wholly failed to prove a constructive trust, particularly in view of the existence of the turn-over order, his knowledge of the same, his alleged participation in the payments upon the order, and his intimacies with the Bankrupt right up until after the Bankrupt had been convicted of concealing the very assets that the Court had ordered the Bankrupt to turn over. Even if, for the sake of argument, it were conceded that the Circuit Court of Appeals did not use correct language in saying that it could not consider the affidavit because no cross-appeal were taken, it would merely be harmless error because of the inadmissibility of the affidavit and the total failure by the Petitioner to sustain his burden of proof on all of the elements which are necessary in a reclamation petition such as is here under consideration.

We do not disagree with the general principles stated by Petitioner to the effect that an appellee may urge upon the Court of Appeals, without a cross-appeal, any adverse ruling on evidence or matters overlooked by the Court in reaching its ultimate conclusion, in order to sustain the position that the judgment should be affirmed. However, the rule is firmly established that it is discretionary with the reviewing court as to what matters it may care to consider in reaching the ultimate conclusion and it is even more firmly established that an appellee cannot urge upon the reviewing court, without a cross-appeal, any adverse ruling of the trial court which would enlarge his rights or diminish the appellant's rights.

There are many cases involving this latter proposition which turn on the question of whether or not such consideration would or would not enlarge the rights of the appellee.

To begin with, the Petitioner has tried to establish his

then found specifically that the Petitioner had not proven any tracing of funds, which he must do just as much as he must prove a fraud which would raise a constructive trust. It is also significant to note that Judge Schnackenberg in the original opinion, concurred specifically in the opinion, but added:

> "Upon the hearing in the District Court both parties had an opportunity to, and did, offer evidence which they considered relevant to all issues presented there and later in this Court. There is no occasion now for a further hearing. Both sides have had their day in court."

After that opinion, in response to Respondent's motion to modify the opinion, the Petitioner filed a long answer which was more or less in the nature of a brief, urging upon the Court the proposition that it should consider the affidavit and citing authorities that the Court could consider the same without the necessity of a cross-appeal. (R. 190.) Thereafter, the Court modified its opinion and struck from it the remandment for further proceedings, consistent with the views expressed in the opinion, and entered judgment for the Respondent.

It is thus obvious that the Court did consider fully the theories advanced by the Petitioner, although it is true that it did not correct that part of the opinion which mentioned that no cross-appeal had been taken. It is also obvious from the opinion that the Court did consider, not only the affidavit, but the transcript of record which was likewise stricken by the trial court, as it is mentioned in detail in the opinion.

However, we do not believe that too much emphasis should be placed upon this particular point in view of our belief that the affidavit was not admissible in the first place and further, in view of the fact that the Petitioner

has wholly failed to prove a constructive trust, particularly in view of the existence of the turn-over order, his knowledge of the same, his alleged participation in the payments upon the order, and his intimacies with the Bankrupt right up until after the Bankrupt had been convicted of concealing the very assets that the Court had ordered the Bankrupt to turn over. Even if, for the sake of argument, it were conceded that the Circuit Court of Appeals did not use correct language in saying that it could not consider the affidavit because no cross-appeal were taken, it would merely be harmless error because of the inadmissibility of the affidavit and the total failure by the Petitioner to sustain his burden of proof on all of the elements which are necessary in a reclamation petition such as is here under consideration.

We do not disagree with the general principles stated by Petitioner to the effect that an appellee may urge upon the Court of Appeals, without a cross-appeal, any adverse ruling on evidence or matters overlooked by the Court in reaching its ultimate conclusion, in order to sustain the position that the judgment should be affirmed. However, the rule is firmly established that it is discretionary with the reviewing court as to what matters it may care to consider in reaching the ultimate conclusion and it is even more firmly established that an appellee cannot urge upon the reviewing court, without a cross-appeal, any adverse ruling of the trial court which would enlarge his rights or diminish the appellant's rights.

There are many cases involving this latter proposition which turn on the question of whether or not such consideration would or would not enlarge the rights of the appellee.

To begin with, the Petitioner has tried to establish his

case on the theory of a constructive trust as firmly set forth in the opinion of the Circuit Court of Appeals. To back up his contention, his testimony is all based upon the theory that he invested money in corporate activities with the Bankrupt, based upon fraudulent statements of the Bankrupt. Of course, this oral testimony of the Petitioner is contrary to the very terms of the written instruments which he introduced, particularly Petitioner's Exhibit 27 (R. 160), being a note dated December 6, 1950, for $7,000.00, signed by the Bankrupt payable to the Petitioner, with interest at 8%, payable December 6, 1951, whereas the Petitioner testified that he had advanced only $6,100.00 to the Bankrupt as an investment in a corporation deal and he expected to make a profit based upon a percentage with what other individuals had put into the operation. (R. 118.) He testified that he advanced $12,500.00 on December 13th, $7,500.00 on December 18th, and $9,000.00 on December 21, 1950, or a total of $29,000.00, all of which was as an investment in the so-called building project upon which he expected to make a percentage of the profits. Yet, he introduces a receipt dated December 22, 1952, being Petitioner's Exhibit 28, (R. 160) signed by the Bankrupt, which recites that he had received of Robert W. Jaffke $35,100.00, "money loaned to me in cash, to be accounted for by December 28, 1950." Thus, the written evidence submitted by the Petitioner showed on its face that it was a loan for a few days to the Bankrupt, to be repaid within 6 days thereafter, which, again, is inconsistent with his theory of a constructive trust and his oral testimony that the money was to be used in a building project.

As against this background, the Petitioner then contends that his Exhibit 24 (R. 203) should have been admitted into evidence, but said Exhibit shows on its face that

the Bankrupt "borrowed the sum," which, again, is inconsistent with Petitioner's theory of a constructive trust and contrary to the necessary requisites of the burden of proof which he must sustain.

The trial court found, without any explanation of mathematical deductions, etc., that the Bankrupt had defrauded the Petitioner of $27,400.00, which the Petitioner paid to the Bankrupt. The trial court rejected the affidavit, properly so, without giving any reason, but it was obvious that it was not admissible in the first place and secondly, that it was inconsistent with the Petitioner's theory of a constructive trust.

The Petitioner urged the Circuit Court of Appeals to accept this affidavit, without a cross-appeal, which, if the Court had accepted the affidavit, might have entitled the Petitioner to a judgment in the sum of $36,000.00 rather than $27,400.00, and upon a completely different theory than Petitioner had based his whole case.

Petitioner has cited the case of *Langnes* v. *Green*, 282 U.S. 531, 1931, which is not exactly in point because it deals with admiralty law, where on appeal there is a trial *de novo*. However, in that case this Court went on to say:

> "These decisions simply announced a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although he has not applied for certiorari; if the court deems there is good reason to do so."

It is significant to note that Finding of Fact No. 4 (R. 166) finds that the bankrupt delivered over to the Trustee in Bankruptcy the sum of $27,400.00. The Court then, in its Conclusions of Law (R. 167) strikes the affidavit of the Bankrupt. This is particularly significant in view of the

fact that Petitioner has cited the case of *Morley Constr. Co.* v. *Maryland C. Co.*, 300 U.S. 185 (1937). In that case the Supreme Court granted certiorari for the particular purpose of fixing the measure of relief, if any, available to a non-appealing suitor. After laying down the general rule that an appellee in the absence of a cross-appeal may urge matters ignored by the court, this Court said: (P. 191.)

> "Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment."

It would appear that Petitioner has erroneously cited the case of *Harding* v. *Federal National Bank*, 31 F. 2d 914 (1st Cir. 1929), as we believe that it sustains our position. In the first place, the Circuit Court of Appeals said that it found no merit in the plaintiff's cross-assignment of errors. Second, that "the decree appealed from was in his favor and granted him all the relief he sought. His cross-appeal was therefore improperly taken (citations omitted) and, such being the case, it was not open to him to assign or argue cross-errors."

The case of *In re Schwartz*, 89 F. 2d ed. 172 (2nd Cir. 1937) does not support the position of Petitioner. The appellee received all of the relief which he had sought in the lower court and therefore, his cross-appeal was dismissed.

In the case of *Lanova Corp.* v. *National Supply Co.*, 116 F. 2d 235 (3rd Cir. 1940) the defendant had judgment entered in its favor on all matters in dispute and the Court properly held that it could not have appealed from the decree given in its favor.

In the case of *United Engineering and Foundry Co.* v. *Cold Metal Process Co.*, 68 F. 2d 564 (3rd Cir. 1934), cert. den. 291 U.S. 675, on the motion of defendant the Court dismissed plaintiff's bill of complaint but because of one finding in the findings of fact the defendant appealed and the Court dismissed his appeal, which, certainly, is not in conflict and has no bearing on the instant case.

In the case of *Aberly* v. *Craven County*, 70 F. 2d 52 (4th Cir. 1934), the appeal of two of the defendants was dismissed because the decree was manifestly in their favor and the court said that they could not appeal from a decree altogether in their favor.

In the case of *Ottenheimer Bros.* v. *Libuwitz*, 74 F. 2d 858 (4th Cir., 1935), cert. den. 296 U.S. 582, the Court said: (p. 863)

> "It sometimes appears that when a party has a decree in his favor, but not to the extent prayed for, the decree becomes binding upon him, in so far as it is unfavorable, unless he takes an appeal. In the pending case, however, the defendant was awarded all the relief to which he was entitled, namely, a dismissal of the plaintiffs' bill, and he was therefore in no position to appeal."

In *Mach* v. *Abbott Co.*, 136 F. 2d 7 (8th Cir., 1943), cert. den. 320 U.S. 773, the court held that the debtor could not appeal because he had secured by a judgment all the relief which he sought.

In the case of *United States* v. *Adamant Co.*, 197 F. 2d 1 (9th Cir., 1952), cert. den. 344 U.S. 903 (1952), there is merely the statement that an appeal lies from a judgment, and not from findings, and that in order that a judgment be appealable at the behest of the party the party must be aggrieved by it.

In the case of *Corning* v. *Troy Iron & Nail Factory*, 56 U.S. 451, 14 L. Ed. 768 (1853) the court said in effect that a court may decree in favor of a complainant but not to the extent prayed for in his bill and he may have just cause of appeal on that account, but where the respondent prayed that the bill be dismissed and, having won such a decree, he cannot have a more favorable one. Therefore, he is not aggrieved by the final decree and cannot appeal.

This case is authority for the proposition that the Petitioner in the instant case was in a position to file a cross-appeal because he did not get all of the relief prayed for in his petition, which we shall discuss later.

In the case of *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151 (1934) the United States Supreme Court dismissed the appeal of the defendant, saying that it was successful in the District Court and has no right of appeal from the decree in its favor.

In the case of *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924), Justice Brandeis very plainly states the proposition, with which we do not disagree, that an appellee may urge upon the Circuit Court of Appeals, without taking a cross-appeal, any matters appearing in the record which were overlooked or ignored by the court. However, Justice Brandeis goes on to say:

> "In other words, the appellee may not attack the decree with a view either to enlarge his own rights thereunder or of lessening the rights of his adversary whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."

In the case of *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1938) the Circuit Court of Appeals dismissed the appeal on the ground that petitioners had

been awarded all of the relief to which they were entitled, notwithstanding an adjudication of part of their claim. The United States Supreme Court granted certiorari, saying that:

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree. But where the decree in itself purports to adjudge the validity of claim 1, and even though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated."

Thus, the Supreme Court ordered the Circuit Court of Appeals to consider the appeal on that portion of the decree. We believe that this case is in support of our contention that where a judgment or decree grants only a portion of the relief sought, the other party is under a duty to cross-appeal.

Therefore, it would appear that from all of the cases we have examined, if a petitioner secures only a portion of the relief which he has sought, then he definitely has a right to take a cross-appeal and has a duty to do so if he insists that the Court consider matters urged in the trial court but not accepted, which would in effect enlarge his rights.

Thus, it is apparent, even from the cases cited by the Petitioner, that the Petitioner could not urge upon the Circuit Court of Appeals the consideration of the affidavit because to do so the Court would have to change the finding of fact No. 4 of the trial court (R. 166) to the effect that the Bankrupt had delivered to the Trustee the sum of $27,400.00, and would thus be enlarging the rights of the Petitioner where no cross-appeal had been filed.

II. The judgment of the District Court should not be affirmed but the decision of the Circuit Court of Appeals should be affirmed.

The purported declaration against interest of the Bankrupt was not in fact a declaration against his interest and was not admissible against his Trustee. There can be no question but that a trustee in bankruptcy would have no right, title and interest in and to any funds or property acquired by a bankrupt after bankruptcy. However, this entire matter must be considered in the light of the turn-over order, which found that the Bankrupt, at the time of bankruptcy, had in his possession the sum of $250,000.00, which should be turned over to his Trustee. Thus, in effect, when this order became final, the Trustee held title to assets worth $250,000.00, which the Court said was in the possession or under the control of the Bankrupt. The Bankrupt never appealed this turn-over order nor did he purge himself of contempt, nor did he make any showing that he did not have the ability to comply with the turn-over order.

Petitioner makes the flat statement on page 20 that the affidavit, being Petitioner's Exhibit 24, was clearly admissible under the Illinois law. We disagree with this proposition. Petitioner has cited only one case to support his theory, being that of *Schell* v. *Weaver*, 225 Ill. 159, 80 N.E. 95. We do not disagree with the proposition of law as set forth in that case. The decedent had borrowed money and, prior to his death, admitted to a third person that he owed the money and was looking for the man from whom he borrowed the money, so that he could repay the loan together with interest. After a claim was filed against the decedent's estate for the money, the third party was allowed to testify as to the statement made by the decedent, which was received in evidence as an admission against his

interest in order to prove the claim against his estate. However, this case does not involve any affidavit which would be contrary to the interests of a trustee after title had passed.

In the case of *Cook* v. *Korshak*, 301 Ill. 603, 134 N.E. 49 (1922) the Supreme Court of the State of Illinois reversed a judgment by the purported owner of a ring against a pawn shop broker, where she had testified, as well as other witnesses, that her son admitted in the presence of the defendant, that he had stolen the ring and taken it to the pawn shop and sold it. The Illinois Supreme Court said, at page 51 N.E.:

> "This was hearsay evidence purely, and was not competent against the plaintiff in error over his objection. Wallace was not a witness on this trial. It is a familiar rule of law that a vendor's declaration after he has sold an article of personal property is inadmissible against the vendee to impeach the vendee's title to the property. The fact that the vendor is a thief, and has stolen the article, can add no greater force to his declaration, and the fact that the declaration is made in the presence of the vendee does not render the evidence competent."

In the case of *Milling* v. *Hillenbrand*, 156 Ill. 310, 40 N. E. 941, the Supreme Court of Illinois said: (p. 942 N. E.)

> "Counsel for the plaintiff sought to introduce evidence of statements by Gordon in relation to the ownership of the goods, made after the sale and delivery thereof to Hillenbrand, and in his absence, and without his assent; and, such evidence having been excluded by the court, its exclusion is assigned for error. It is a rule too familiar to require discussion that the statements of the vendor of goods, made after the sale, and out of the presence of the vendee, cannot be received to defeat the vendee's title."

In the case of *Illman* v. *Kruse*, 301 Ill. 408, 134 N. E.

107 (1922), the Supreme Court of Illinois said, at page 108 N. E.:

> "It is strongly argued by counsel for defendant in error that the above letter was written after the writer had sold and assigned all his interest in the land, and therefore it could not be admissible in evidence against defendant in error. * * * * We are of the opinion that under these authorities this letter was not admissible in evidence, and should not be considered, whatever its evidentiary force might be held to be."

In the case of *Dausch* v. *Barker, et al.*, 329 Ill. 410, 160 N. E. 765 (1928) the Supreme Court of Illinois said:

> "Statements or affidavits made by a grantor after he has parted with the title, are not admissible in evidence to impeach that title."

So far as we know, there have been no Illinois cases involving declarations of a bankrupt made after title has passed to the trustee in bankruptcy, probably because all bankruptcy matters are handled under the Federal statute and not under local statutes. However, a case involving an assignment for the benefit of creditors is that of *Myers* v. *Kinzie*, 26 Ill. 36, where the Court said at page 38:

> "No cases can be found in the books where it has been held that the statements of an assignor of property assigned to trustees for the benefit of his creditors made after the execution of the assignment were legal evidence against the assignees. *There would be no security in titles if they were.*" (Emphasis added.)

The general law on this question is to the effect that statements of a bankrupt made after his bankruptcy and after the property has vested in the trustee in bankruptcy do not bind his estate so as to be admissible against the trustee in bankruptcy in an action brought by him as trustee, or in an action in reclamation brought against the trustee. 6 *American Jurisprudence* page 1265, section 1192;

53 A.L.R. 650; 20 *American Jurisprudence* page 518, section 604; *M'Iver v. Kyger,* 3 Wheat. U.S. 53; *Whitmore* v. *Murdock,* 29 Fed. Cases No. 17,509; *In Re Haynsworth,* 34 Fed. 2d 334; *Myers* v. *Kinzie,* 26 Ill. 36.

The only time so far as we can find, that this question has been passed upon by the United States Supreme Court was in the case of *M'Iver* v. *Kyger,* 3 Wheat. U. S. 53. The opinion in this case was written by Chief Justice Marshall. This was an action for specific performance of a contract for the exchange of land. Kyger deeded a tract to one Watson, the bankrupt, but at the time the alleged agents of the parties made the evaluation of the tracts Kyger was to receive, Watson had become bankrupt. Kyger demanded a deed, and Watson excused himself on account of his bankruptcy, but executed a release which recited the agreement between the parties, the valuation of the land, and that a deed for the land had been executed by him and was in the hands of his assignee in bankruptcy. The lower court decreed a conveyance, but the Supreme Court reversed that decision. The defendant trustee (assignee) in bankruptcy denied the authority of the agents to make the valuation, and no proof was offered of this authority. The Court went on to say, at page 57: "And the recitals of the deed of release executed by Watson after he became a bankrupt are not evidence."

This matter was further reaffirmed in the case of *Whitmore* v. *Murdock,* 29 Fed. Cases No. 17,509. The court held that the statement of the bankrupt made after his bankruptcy and after the property had vested in his assignee in bankruptcy was inadmissible. The Court said at page 923: "After that he cannot be a witness or his confessions be competent to affect the previous title."

The case of *In Re Haynsworth,* 34 Fed. 2d 334, involved

a case where certain notes were listed as obligations of the bankrupts in their schedules in bankruptcy, with a statement that these notes had been assumed by the firm. The Court held that this *ex parte* statement without the right of cross examination was not binding on the trustee for the other creditors.

Leaving aside the question of the admission of the bankrupt after title has vested in his trustee, a number of Federal cases have squarely held that affidavits are *ex parte* statements, inadmissible in evidence in the Federal Courts. *Columbia Casualty Co.* v. *Thomas,* 101 Fed. 2d 151; *Stevens* v. *Howells Sales Co.,* 16 Fed. 2d 805; *Vendetti* v. *U. S.,* 45 Fed. 2d 543; *United States Fidelity & G. Co.* v. *Commercial Nat. Bank,* 55 Fed. 2d 564; *Pandolfo* v. *U. S.,* 286 Fed. 8, certiorari denied 261 U.S. 621; *Karpathiou* v. *Schlotfeldt,* 106 Fed. 2d 928.

The case of *Columbia Casualty Co.* v. *Thomas,* 101 Fed. 2d 151 was an action by an automobile liability insurer for a declaratory judgment against the insured driver of the truck involved in the accident and the parties injured in the accident. The insurer offered the affidavit of the driver of the truck as to what he was doing in and with the truck before and at the time of the collision to substantiate the insured's non-liability under the policy. The Court said that if the admissions of the driver in this *ex parte* statement were binding upon the assured and those injured such policies would be of small value. The Court said on page 152:

> "For it is unfortunately true that *ex parte* affidavits which do not speak the truth are easily procurable, and are procured from willing persons who though they may not be corrupt may be ignorant and easily led. If to their effect against the affiant there is added by the rule invoked an effect against third persons such af-

fidavits will be at a premium and the race for them will be on."

In the above mentioned Columbia Casualty case, it would seem that the Court gave the most forcible reason for not accepting such affidavit, and which most certainly should apply to the instant case. Here the Bankrupt had borrowed money from Jaffke, with the first borrowing being admittedly for the purpose of paying on the turn-over order, with the knowledge and consent of the Petitioner, who knew that the Bankrupt had been found to have the sum of at least $250,000.00 in assets in his possession or under his control. Petitioner admitted that he had been defrauded of the sum of $11,300.00 prior to the bankruptcy, which was still due and owing to him, and yet, he continued thereafter to be the friend of the Bankrupt, taking his wife to jail to visit with him, carrying the Bankrupt back and forth at the trial at which the Bankrupt was convicted of concealing the assets, without any compensation for his services, all after he claims he was defrauded. The Petitioner, himself, had the affidavit prepared and sent over to the jail to obtain the signature of the Bankrupt, all of which creates such an atmosphere that can lead only to a conclusion that the Petitioner was engaged in activities with the Bankrupt, trying to thwart the legal duty of the Trustee to collect the $250,000.00 which was imposed upon him by a Court order, after he had either failed to make a profit in the business venture with the Bankrupt, or to share in concealed assets. Then he conspires with the Bankrupt to obtain an affidavit which will give him his money back in preference to other creditors.

The Petitioner has posed a very difficult problem in his brief for the Respondent to answer each and every one of the allegations which have been made. For example, he continues to refer to Exhibit 29, which was stricken by

the trial court, particularly on page 38 in the footnote, which is taken from that same Exhibit, without mentioning such fact. We can only answer such allegations by also referring to that Exhibit, although we still contend that it was not then, and is not now, admissible as evidence. That transcript shows that neither the Trustee nor his attorney were present at the time of that *ex parte* proceeding in chambers. It is also significant to note that the Bankrupt did not pay anything on the turn-over order after this *ex parte* hearing on March 11, 1952. So, regardless of what may have been said or done at that hearing, the Trustee could not in any way be charged with notice because he was not present and further, because he did not receive any money thereafter. However, it is significant to note that the Bankrupt did not make any attempt to purge himself of contempt at that time, because of any inability not to make good on the turn-over order, or that he could not possibly comply with the same, but did assure the Court that if he was released from prison he could pay the turn-over order in full within a matter of 3½ days. This was verified by his attorney, Mr. William Giffin, who was then the Bankrupt's attorney, and is now representing the Petitioner Jaffke in this proceeding, when he said to the Court:

> "I don't think there is any question but what he will have the money and clear up all features of the transaction." (R. 209.)

The record is barren of any activity thereafter, except that the Bankrupt, in February of 1953, was convicted for concealment of assets by a Federal Court jury. It is evident that the affidavit which was supposedly executed on August 1, 1952, several months after this *ex parte* proceeding, and prior to his trial for concealment of assets, was executed at a time when he needed Jaffke as a witness to testify in his behalf at said trial.

Jaffke testified that he prepared the affidavit, but Attorney Heinze, who took the affidavit into the jail, had just come from Attorney Giffin's office, where he had met with Mrs. Knetzer to discuss whether or not he would represent Knetzer.

On page 22 and 23, Petitioner says that this affidavit was a declaration against the interests of the Bankrupt. The Bankrupt had already signed receipts and notes, which he gave to the Petitioner, which show on their face that they represented moneys borrowed from the Petitioner. The affidavit, itself, states that the Bankrupt "borrowed" the money from Petitioner, but it does not state for what purpose the money was borrowed, nor does it show on its face any reason why it would be wrong for the Bankrupt to turn that money over to the Trustee, especially in view of the fact that the Petitioner had already testified that part of the money was given by him to the Bankrupt for the express purpose of turning the money over to the Trustee. Therefore, Petitioner's statement that by the affidavit the Bankrupt admitted that he had improperly diverted a portion of the funds obtained from the Petitioner, to the Respondent, is not a correct statement, because that does not show on the face of the affidavit.

Of course, if this were only a proceeding between the Petitioner and the Bankrupt, there is no question but what it would be admissible as an acknowledgment of a debt which might be due from the Bankrupt to the Petitioner. However, as we have previously pointed out, this is not such an admission which can be proven against the Trustee by an *ex parte* affidavit.

III. A trustee in bankruptcy does not have a duty to investigate the source of payments made to him in compliance with a turn-over order.

Beginning at page 27 of his brief, Petitioner devotes the remaining 12 pages in an attempt to castigate the Trustee for what he claims is his failure to do his duty. He does not discuss the necessary requirements of the evidence required to prove a constructive trust and the tracing of funds and other related matters, which are necessary to a final disposition of this case, but it appears that he tries to obscure these issues by making it appear that the Trustee was neglectful in his official duties.

It is understandable that the Trustee had a tremendous job on his hands to try to unravel the affairs of this multi-million dollar bankruptcy. It is no secret that the Bankrupt was involved in a tremendous fraudulent scheme, by which he took in many millions of dollars on promises to deliver cars and trucks. Of course, he did deliver many cars and refunded a substantial amount of money to his creditors before the bankruptcy. However, after the Trustee assumed his duties and was able to find his way through the maze of records and other evidence available, and after the completion of an audit on the affairs of the Bankrupt, he filed his petition for a turn-over order and, after the presenting of evidence, the Court ordered the Bankrupt to turn over the sum of $250,000.00, which the Court found that he had in his possession or under his control. The order itself recites that evidence was presented on this matter.

It is unfortunate that under our laws and procedures the F.B.I. cannot be compelled to testify as to all of this activity, nor could the Trustee divulge all of his dealings with the F.B.I., but I think it can reasonably be assumed that there was perfect cooperation between him and the F.B.I. during all of the periods involved in this matter. The Court sustained an objection when the Trustee was

asked about his activities with the Federal Bureau of Investigation. (R. 93.)

The Trustee was compelled to go after the Bankrupt with every means at his command, to collect the sum of $250,000.00.

It is also very obvious that if the Bankrupt had walked into the Trustee's office and said, "Here is money that belongs to you that I have been holding out.", he would have automatically been guilty of concealing assets and could have been prosecuted for such activity, particularly after he did not comply with the turn-over order immediately upon its execution. It is only natural to assume that he would resort to devious methods of having these payments made by and through third parties, to make it appear as loans, in order to possibly have an alibi. However, the end result was the same, inasmuch as he was convicted of concealment of assets. That, in itself, should be proof that all of these devious methods of the Bankrupt were of no avail because, eventually, justice caught up with him and he was convicted. If, as Petitioner would have this Court believe, all of the Bankrupt's activities were confined to fraudulently obtaining money from other persons, without having any money concealed, then perhaps the United States Department of Justice committed an inequity by convicting him for concealment of assets.

Petitioner makes mention of the fact that the Trustee sat through creditors meetings wherein the Bankrupt was interrogated as to where he was getting money to live high, wide and handsome, after the bankruptcy, and different explanations were given, such as borrowing money from friends. Naturally, this could only be taken with a grain of salt in view of the fact that after handling millions of dollars he should and did have funds on hand at the time of bankruptcy, as found by the Court.

It is fundamental that the Trustee succeeds to all of the right, title and interest of the Bankrupt in both personal and real property. Although after a diligent search we find no case exactly in point, we do believe that the same principle would apply where the Court enters a turn-over order finding that the Bankrupt is withholding assets belonging to his Trustee; that the title would pass when the order became final. Therefore, the Bankrupt is merely handing over to the Trustee personal property to which title passed as of the date the order became final.

The case of *Avery* v. *Cleary*, 132 U. S. 604, cited by Petitioner, is not in point in connection with this matter, because there the trustee waited several years before making an inquiry as to whether the bankrupt had any life insurance and in the face of a two year statute of limitations filed a suit to recover on policies which had already been paid, claiming that the limitation should not apply to him because he did not have notice. It would seem the Court rightfully held that he was not entitled to recover; that the two year limitation applied to him because he had not made a diligent inquiry as to the assets of the bankrupt in connection with life insurance policies held by the bankrupt.

Likewise, the case of *Zartman* v. *First Nat. Bank*, 216 U.S. 134, is not applicable to the instant case, because in that case the Court merely held that a contract could be reformed where there had been a mutual mistake in preparing it. The Bankrupt had owned the property prior to the bankruptcy and the Trustee merely took title subject to the same equity as the Bankrupt had.

No one can quarrel with the law as laid down by this Court in the case of *Maggio* v. *Zeitz*, 333 U. S. 56, because there the bankrupt came in upon a petition to be purged

of contempt on the theory that he could no longer comply with the turn-over order, which the Court found to be a fact. But we do not have that situation in the instant case, because the Bankrupt never established that he should be purged of contempt because of his inability to comply with the turn-over order.

If there had not been any turn-over order, then we can concede that the Trustee would have been under a duty to ascertain from what source he might acquire properties or money from the Bankrupt, not listed as assets by the Bankrupt, but which might come to him voluntarily from the Bankrupt, as after-acquired property, but in the instant case that is not the situation because of the turn-over order.

On page 32, under Point III-C, Petitioner advances an argument that we do not understand. He says that the Trustee was under a duty to ascertain whether or not the moneys obtained on the turn-over order should have gone to the bankrupt estate of Robert L. Knetzer or to the bankrupt estate of the Knetzer Motor Sales Company. That matter was settled by the District Court on July 11, 1949, when he entered the turn-over order, and he found in that order that the bankrupt estate of Knetzer Motor Sales Company was not entitled to any turn-over order, that any moneys received on the turn-over order would go to creditors of the bankrupt estate of Robert L. Knetzer as an individual. (R. 144.)

On pages 33 and 34 of his brief, Petitioner blows both hot and cold. He first says that the Respondent had knowledge of sufficient facts to put him on notice that the Bankrupt was not paying in concealed assets, and in the same paragraph, says that the Respondent must have had, at minimum, reason to believe that the Bankrupt had con-

cealed assets and was a person not to be trusted. It is true that the Respondent had knowledge of the Bankrupt's fraudulent activities before the bankruptcy, but it is also true that the Petitioner had the same knowledge, as he so testified.

Petitioner states that the Respondent heard testimony of third parties and the Bankrupt, under oath, that the Bankrupt had been borrowing from third parties.

He refers to pages 38 and 39 of the Record, which merely contain statements by Mr. Griffin, the attorney, and are not evidence in this matter. He refers to the hearing of March 11, 1952, which is Petitioner's Exhibit 29 (R. 204), which was stricken by the trial court, but which shows on its face that the Trustee was not present, nor was his attorney. The date of April, 1950 definitely is not in evidence anywhere in the record. On page 84 of the record, mentioned by the Petitioner, it does show that a man by the name of Rhodes did make some payments for and on behalf of Knetzer, but the Court sustained objections as to questions as to any creditor's meeting at which the matter of loans were mentioned, and there was never any answer given by the Trustee, and the trial court said:

> "I can't see where that is material at all, whether somebody else may or may not have loaned anything to him. The rumors and stories going around would lead a man to believe anything."

Petitioner continuously makes the statement that the Trustee knew that the Bankrupt was out of jail and not in the custody of the Marshal. The Trustee testified that he made a distinction between actual confinement and technical confinement and that he did not know where the Marshal was on the occasions that the Bankrupt came into his private office. However, the Petitioner starts out his

brief, on page 4, by stating that the Bankrupt was permitted to leave jail on different occasions in the custody of the U. S. Marshal. Judge Briggle, in connection with Petitioner's Exhibit 29 (R. 204), stated that the Bankrupt would have to pay the expenses of the Marshal, who had been accompanying him on his trips, to the extent of some $10,000.00. That same exhibit shows the following:

> "Court: You must remember you represented to this Court on various occasions that you had the ability to comply with the turn-over order if released for a short time from the city prison and you have on numerous occasions been permitted to go in the custody of the Marshal and you have never lived up to the promises in full. That's true, isn't it? (fol. 211). Mr. Knetzer: "Yes, it is." (R. 106.) . . .
>
> "The Court: How long were you out with the Marshal since you were last released, do you remember? Mr. Knetzer: March, your Honor, last March. Court: You haven't been out all of that time? Mr. Knetzer: Yes, I have, your Honor. Court: You were out in the custody of the Marshal since March, 1951." (R. 211.)

Surely, this is not proof of any failure of duty on the part of the Trustee for, as the trial court pointed out, (R. 86) the Bankrupt was released from jail on the Court's order.

In the footnote at the bottom of page 34 Petitioner resorts to what might be regarded as scandalous statements, when he implies that the Trustee did not fulfill his duties in reporting violations of the bankruptcy laws to the United States Attorney. It is true that the Trustee did not testify as to relating all of his activities to the various authorities concerned with criminal prosecution, but it stands to reason that he did fulfill all of those duties, particularly in testifying before Grand Juries, as shown by the

record itself, and that he was constantly in touch with the Court, advising him as to what progress had been made on the turn-over order. Certainly, Petitioner cannot disclaim his own offer of evidence being Exhibit 29, which shows that the District Attorney had full knowledge of the amount of money which the Bankrupt had paid to his Trustee in the total sum of $170,000.00.

The Petitioner has the burden of proving his case in this matter and the fact that the Trustee did not describe all of his activities in detail, certainly is not proof that he did not so cooperate with all of the necessary authorities and do everything within his power to efficiently administer the bankrupt estates.

IV. Petitioner's allegation that the Respondent may not profit from his failure to make the necessary inquiry demanded by the circumstances of this case is without merit.

We have no quarrel with any of the cases cited on pages 38, 39 of Petitioner's brief. However, we wish to point out that these cases are not in point in connection with the instant case. Most of these cases refer to the operation of a business after bankruptcy, by an officer of the court, who failed to pay the sales tax, or withholding tax, or other tax money which were expressly impressed with a trust by virtue of statutes. Therefore, it naturally follows that the court could not permit, either a debtor in possession or a trustee in bankruptcy, to conduct a business under its orders and commingle funds contrary to a statute which impressed them with a trust the moment they were taken in by such individuals. Surely we do not have a similar situation here where a Trustee is collecting money under a turn-over order.

On pages 36 and 37, Petitioner argues with the decision of the Circuit Court of Appeals and says that its analysis of the evidence is incorrect. In doing this, Petitioner refers to matters which are not in the record.

The following chart, we believe, is a pretty clear picture as to the transactions involved, and is taken from the record and is what was used by the Circuit Court of Appeals in reaching the conclusion that it did.

Riley testified that he paid Knetzer as follows:		Jaffke testified that he paid Knetzer as follows:		Petty testified that he paid Knetzer as follows:	
6-28-50	250	12-7-50	6,100	4-14-51	5,000
6-30-50	1,000	12-13-50	12,500	4-29-51	7,500
7-2-50	600	12-18-50	7,500	5-4-51	8,500
7-18-50	6,000	12-21-50	9,000	5-10-51	8,000
7-27-50	9,000	1-3-51	6,000	5-28-51	14,500
8-2-50	200	1-8-51	1,000	6-51	500
8-10-50	8,000	3-14-51	520		
8-15-50	2,208	5-21-51	260		$ 44,000
9-12-50	2,831	Aug. 51	300		
9-15-50	2,300	Oct. 51	2,000		
		Oct. 22, 51	2,800		
	$ 32,389				
			$ 47,980		

It was stipulated that Gerald Sammons paid to Knetzer between October 1, 1951, and February 1, 1952, the sum of $101,550.00.

The Trustee was called as an adverse witness by the Petitioner and asked about the dates when he received monies on the turn-over order. It must be remembered that his interrogation was limited to monies received between

October 19, 1950 and November 1951 (R. 87.) The dates, by whom paid and to whom, and the amounts are as follows: (R. 77-87)

	Monies paid direct to	
Dec. 8, 1950	G. W. Horsley	5,000
Dec. 13, 1950	Currency from Robert L. Knetzer to Dunham	3,500
Dec. 22, 1950	Knetzer paid to Horsley	1,500
Jan. 1951	No payments	
Feb. 1951	No payments	
Mar. 1951	No payments	
Apr. 9, 1951	Knetzer paid to Horsley	5,000
Apr. 14, 1951	Attorney Cohn paid to Dunham	5,000
Apr. 19, 1951	" " " " "	5,000
Apr. 23, 1951	" " " " "	5,000
May 1, 1951	" " " " "	5,000
May 7, 1951	" " " " "	5,000
May 10, 1951	" " " " "	5,000
May 21, 1951	" " " " "	5,923.72
May 24, 1951	" " " " "	5,000
May 29, 1951	" " " " "	5,000
June 4, 1951	" " " " "	5,000
Oct. 11, 1951	" " " " "	5,000
Oct. 21, 1951	" " " " "	5,000
Nov. 13, 1951	Rex Rhodes paid to Dunham	1,000
Nov. 14, 1951	" " " " "	1,000
Nov. 15, 1951	" " " " "	1,000
Nov. 16, 1951	" " " " "	1,000
		$ 79,923.72

• • •

Thus, it is apparent, from the foregoing, that Jaffke testified that he gave to Knetzer the sum of $42,100.00 dur-

ing the period from December 7, 1950 through January 8, 1951. However, the Trustee received on the turn-over order, either from Knetzer or anyone for and on his behalf, during that same period of time, only the sum of $10,000.00. It is further significant to note that the Petitioner testified that he gave to Knetzer $6,100.00 and knew that it was for the purpose of being applied on the turn-over order. It is further significant that during the months of January, February and March, the Trustee did not receive any payments on the turn-over order. During the period from January 8, 1951 through October, 1951, Jaffke testified that he advanced to the Bankrupt only the sum of $1,080.00. Yet, during that same period of time, a man by the name of Petty testified that he gave to Knetzer the sum of $44,000.00, and it is further significant that, beginning on April 9th, Knetzer paid $5,000.00 to the Trustee and thereafter Attorney Cohn paid to the Trustee several sums of money, which, up to November 1st, totaled $65,923.72.

Thus, the Circuit Court of Appeals properly analyzed this situation in its opinion when it said:

> "The total amount paid to Knetzer by these four men was $225,919.00. Of this amount Knetzer paid to the Trustee during the period here in question only $79,923.00. It is evident, therefore, that $145,996.00 of the amount Knetzer received from these four men was not paid over to the Trustee."

The Court then goes on to analyze the exact periods of payment, matching them up with the dates when Jaffke testified that he gave Knetzer money, and finds that the payments to the Trustee could have been made by any one of the men.

The most significant fact is that Attorney Cohn was called as a witness by the Petitioner, but he does not shed

any light whatsoever upon the tracing of the funds. His only statement was that he paid the money to the Trustee and part of it came from the Bankrupt and part of it came from other persons, whom he did not identify. He, therefore, in effect disproved Petitioner's theory because he did not testify that the Petitioner ever gave him any money and that although the Petitioner was in his office one time in the company of the Bankrupt, it was not on an occasion when the Bankrupt gave him any money.

In fact, Attorney Cohn testified that during the period, April 14, 1951 to November, 1951, he paid approximately $70,000.00 to the Trustee and could only say that more of it was paid to him by the Bankrupt than any other person. Even if we assume that $35,000.00 of it was paid to him, it is less than the $44,000.00 which Knetzer received from Petty during that same period of time, a time during which Jaffke testified that he did not pay anything to the Bankrupt, except for a small sum during the summer which amounted to approximately $1,000.00. Therefore, if Petitioner is relying upon inferences, then his own witness, by inference has proved that it was not his funds that came into the hands of the Trustee but the funds of Clint Petty or someone else. (R. 134-135.)

V. In a reclamation proceeding the burden of tracing funds is upon the Petitioner, because the possession of property by the Trustee raises a presumption of ownership and the claimant must overcome this presumption by clear, convincing and unequivocal evidence.

Petitioner has, by innuendo, tried to say that the burden is upon the Trustee in this matter. He has not cited any cases to support his theory. On the other hand, all of the case law of the State of Illinois and of the Federal Courts has been to the contrary.

In Volume 5A, Remington on Bankruptcy, 1950 Edition, Section 2480, pages 291, 292 this brief summary of the law is set forth, citing many cases:

> "*Burden of Proof and presumptions.*—In all reclamation proceedings the burden of proof may be said to be on the petitioner both to make out his rights and to identify the property or funds which he seeks to recover among the effects of the bankrupt. Possession of property of itself raises a presumption of ownership, and the reclaimant must accordingly overcome this presumption. It is well settled that the reclaimant has the burden of showing that his property came into the bankrupt's possession and was still there in the same, or an identifiable transmuted form, when the bankruptcy petition was filed. Nor is he excused from sustaining the burden of proof resting upon him by the fact that account books of the bankrupt have been accidentally lost. Even the reclaimant's uncontradicted testimony need not be accepted as true, if inherently incredible."

Again, in this same Volume, in Section 2493, Remington says:

> "Where fraud is charged, strict proof is required." (Citing many cases.)

The Petitioner has the burden of proving that the Trustee holds the funds given by Petitioner to the Bankrupt. In other words, he must prove by clear and convincing evidence that he gave money to the Bankrupt and that such money was given by the Bankrupt to the Trustee. Circumstantial evidence is not sufficient, but the evidence must be strong. The Trustee contends that there is NO evidence in this case.

In the case of *Schuyler* v. *Littlefield*, 232 U.S. 707, p. 713, Brown & Co. obtained 300 shares of Interborough stock from Schuyler and others on false representations of sol-

vency. The appellants contended among other things that their money in the amount of $9,600.00 had been traced by the evidence into stocks which had subsequently come into the hands of the trustee in bankrupty.

The Court of Appeals held that the trust fund had not been traced into the hands of the trustee and dismissed the complaint.

The U. S. Supreme Court affirmed the Circuit Court of Appeals and said:

> "It would serve no useful purpose to make a detailed statement of the testimony. The evidence has been fully discussed by the Court of Appeals (193 Fed. Rep. 24-33) in considering this claim of appellants along with that of several other parties seeking, on somewhat similar facts, to trace trust funds into the bank and thence into collateral which ultimately came into the hands of the Trustee. All these claims were disallowed because of the failure to make the requisite proof. Our investigation of the facts leads us to the same conclusion so far as concerns the appellants' claim. They were practically asserting title to $9600 said to have been traced into stock in the possession of the Trustee. Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock their claim must fail. If their evidence left the matter of identification in doubt the doubt must be resolved in favor of the Trustee, who represents all of the creditors of Brown & Co., some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund."

In the case of *In Re Harigan Supply Co.*, 2 Fed. 2d 791, decided by the 8th Circuit Court of Appeals in 1924, the court said at page 792:

"Accepting for the purposes of this opinion and decision but not deciding that the funds in dispute are trust funds if proper identity thereof can be shown in possession of the trustee, we examine this matter of identity. That these funds went into the bankrupt business is not questioned, but that is not enough. Such funds must be traced directly into money or property coming into the hands of the trustee. . . . . The proof here fails to trace these trust funds beyond entry, at various times and in various amounts into the general business of the bankrupt. It shows no direct connection between such funds and the property coming to the trustee."

To the same effect see *Board of Commissioners* v. *Strawn*, 157 Fed. 49, 84 CCA 553; also *John Deere Plow Co.* v. *McDavid, CCA* 8th, 1905, 137 Fed. 802; *In Re A. D. Matthews & Sons*, 238 Fed. 785.

We find no case contrary to the established principles that the Petitioner must trace the funds by clear and convincing evidence, and that conjecture, surmise and circumstantial evidence will not suffice.

To begin with, the Petitioner knew that the Bankrupt had committed a giant hoax and fraud on the public before he went bankrupt, even to the extent of taking some of Petitioner's money which had never been paid. The Bankrupt was under a turn-over order to pay $250,000.00 to the Trustee, all of which was known to the Petitioner. In fact the Petitioner says that the first money given to the Bankrupt by the Petitioner was for the purpose of paying on this turn-over order to keep him out of jail. Petitioner admits this, but now he comes into court and says he wants his money back. Is this court to be asked to allow an individual to knowingly advance money to a bankrupt who is concealing assets, while in contempt of court, to keep the bankrupt out of jail and thus engage in a

business venture with him, and then later ask to have that money repaid to him? We think not.

VI. Before the Petitioner could recover in this matter it was incumbent upon him to establish a constructive trust by sustaining his burden of proof with evidence which was so clear and convincing, and so strong, unequivocal and unmistakable as to lead to but one conclusion.

The trial court found, as a finding of fact, that the Bankrupt had obtained money from the Petitioner by fraud and misrepresentation. (R. 166.)

As we have previously pointed out, the Circuit Court of Appeals for the Seventh Circuit found that all of the Bankrupt's operations had been fraudulent, even before bankruptcy, but that Petitioner's proof that he had been so defrauded by Knetzer was not enough to establish the preference he sought over the other creditors. Thus, in effect, the Circuit Court of Appeals found that the Petitioner had failed to prove his theory of a constructive trust.

The Seventh Circuit Court of Appeals has followed the Illinois law in the matter of constructive trusts, and we believe that we can safely say that it is the well established law that before a constructive trust is raised, a petitioner must prove fraud by proof that is clear and convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion. *Chain O'Mines* v. *United Gilpin Corporation*, 109 F(2d) 617, CCA 7th 1940 cert. den. 61 S. Ct. 14, 311 U.S. 659. In that case this Court said at page 622:

> "Not unmindful of the rule which requires affirmance of the decree where circumstantial evidence exists to support it, we are also under the obligation to study the evidence and ascertain whether it is of the quantum and persuasiveness required by the law of Illinois

quoted above. When we find the record consists, as here, largely of documentary proof, the duty to give it our construction instead of accepting the views of the trial court, is clear and cannot be avoided. *Uihlein* v. *General Electric Co.*, 7 Cir. 47 F(2d) 997."

The Illinois law which the Court referred to in this opinion and which the Court likewise set forth at page 622 was to the effect:

> "The rule of the Illinois Supreme Court, stated in *Rubin* v. *Midlinsky*, 321 Ill. 436, 152 N.E. 217, 219 is that a constructive trust will not be imposed except where the proof of fraud is 'clear and convincing, and so strong, unequivocal and unmistakable as to lead to but one conclusion. . . . If the explanation of the evidence may be made upon theories other than the existence of a constructive trust, such evidence is not sufficient to support a decree declaring and enforcing such trust'."

To the same effect the law is restated in the cases of *Grand Trunk Western R. Co.* v. *Chicago & Western Indiana R. Co.*, 131 F. (2d) 215; *Jacoby* v. *Shell Oil Co.*, 196 F(2d) 855; *National Waste Co.* v. *Spring Packing Corp.*, 200 F (2d) 14, cert. den. 345 U.S. 509.

In addition to the quantum and type of proof of the elements of a constructive trust under the Illinois law consist of the same elements as are necessary to be stated in an action at law for fraud and deceit. *Johnston* v. *Shockey*, 335 Ill. 363. As was stated in the case of *Roda* v. *Berko*, 401 Ill. 335, 81 N.E. 2d 912:

> "A misrepresentation, in order to constitute fraud which will warrant a court of equity in rescinding a contract, must contain the following elements: It must be a representation in the form of a statement of a material fact, made for the purpose of inducing the other party to act. It must be false and known by the party making it to be false, or not actually believed

by him on reasonable grounds, to be true. The party to whom it is made must be ignorant of its falsity, must reasonably believe it to be true, must act thereon to his damage, and in so acting must rely upon the truth of the statement. *Bouxseim* v. *First Nat. Bank of Granville,* 292 Ill. 500, 127 N.E. 133; *Krankowski* v. *Knapp,* 268 Ill. 183, 108 N.E. 1006; *Gillespie* v. *Fulton Oil and Gas Co.,* 236 Ill. 188, 86 N.E. 219; *Prentice* v. *Crane,* 234 Ill. 302, 84 N.E. 916."

Before considering the facts in this matter and laying them down side by side with these yardsticks, may we examine two more principles of Illinois law which are applicable. First, it was said in the case of *Morel* v. *Masalski,* 338 Ill. 41, 164 N.E. 205:—

"These general rules, however, have some limitations. In all cases where it is sought to hold one liable for false representations, the question necessarily arises whether, under all the circumstances, the party seeking relief had a right to rely upon the representations made. In determining this question the representations must be viewed in the light of all the facts of which the party injured had actual knowledge and also such as he might have availed himself or by the exercise of ordinary prudence. If it appears that there were facts and circumstances present at the time the false representations were made sufficient to put the injured party upon his guard or to cast suspicion upon their truth, and he neglected to avail himself of the warning thus given, he will not afterwards be heard to complain, for the reason that his own conduct contributed to his injury. Ordinarily one is not liable for false representations respecting a mere question of law. *Dillman* v. *Nadlehoffer,* 119 Ill. 567, 7 N.E. 88. A person in possession of his mental faculties is not justified in relying upon representations made, when he has ample opportunity to ascertain the truth of the representations before he acts. When he is offered the opportunity of knowing the truth of the representa-

tions, he is chargeable with knowledge. If he does not avail himself of the means of knowledge open to him, he cannot be heard to say he was deceived by the misrepresentations. *Dickinson* v. *Dickinson,* 305 Ill. 521, 137 N.E. 468; *Hustad* v. *Cerny,* 321 Ill. 354, 151 N.E. 871. It is only in cases where the parties do not have equal knowledge or means of knowledge of the facts represented that equity will afford relief on the ground of fraud and misrepresentation. *Johnson* v. *Miller,* 299 Ill. 276, 132 N.E. 490."

To the same effect, see *Bundesen* v. *Lewis,* 368 Ill. 623, 15 N.E. 2d 520; and *Dickinson* v. *Dickinson,* 305 Ill. 521, 137 N.E. 468.

Secondly, the Illinois law requires a petitioner to come into Court with clean hands and requires his actions to have been such that his hands have been clean throughout the whole transaction. The Supreme Court of the State of Illinois in the case of *Rosenbaum et al.* v. *Huebner et al.,* 277 Ill. 360, 115 N.E. 558, said:

"It is a well-settled doctrine that where a conveyance has been made for the purpose of hindering, delaying, or defrauding creditors of a grantor, or where anticipated danger of litigation or criminal prosecution has influenced the conveyance, equity will not interpose to restore to the grantor or his heirs the title to the property so conveyed."

Without detailing all of the facts in the instant case, most of which have been scattered throughout our brief, it would appear that the Petitioner did not act as a prudent man; that he was dealing with a man whose previous activities he had known to be fraudulent and yet he did not make inquiry of the officers of the corporation as to the activities of the corporation; that he knew about the turn-over order and even gave the Bankrupt money to pay upon the turn-over order; that he knew that the Bankrupt was en-

gaged in *sub rosa* activities by conducting businesses without having his name connected therewith; that he even cooperated with the Bankrupt to testify in his behalf on a trial for concealment of assets.

It is undisputed that Petitioner was a man of wide business experience, with adequate legal counsel who handled his matters for him, yet he purportedly invested money in a corporate deal, not for the purchase of stock but in order to get a percentage of the profits, which, of course, is contrary to his own exhibits which indicate that he loaned money for short periods of time to the Bankrupt as an individual, at a specified rate of interest, to be repaid on dates certain, without said instruments bearing any restriction upon the use of the money so borrowed, all of which is contrary to his oral statements.

Therefore, we can only conclude from all of the evidence in the record, including all of the inferences most favorable to the Petitioner, that he did not act as a prudent man would act under the circumstances, that he entered into a scheme with a Bankrupt who was operating a business while concealing assets and while in contempt of court, all of which was known to the Petitioner. We sincerely believe that the evidence in this case as to any fraud is not clear and convincing and unequivocal. Petitioner's own Exhibit shows on its face that he loaned the Bankrupt money for a short period of time. The only inference that can be drawn is that this loan was so the Bankrupt could have money to use in lieu of leading the Trustee to his concealed assets.

We, therefore, believe that under the holdings of this Court and the Supreme Court of the State of Illinois the Petitioner has failed to prove that money was obtained

from him by fraud and further that he has any right to recover under the theory of fraud.

VII. The Petitioner was not a competent witness in his own behalf in this proceeding, under the statutory law of Illinois.

In the Circuit Court of Appeals the Respondent urged this matter, but that Court rejected our theory that the Petitioner was not a competent witness. We have preserved our objection to his testimony by making objection at the proper time, when he was first offered as a witness in his own behalf. (R. 40.)

The Circuit Court of Appeals did not squarely hold whether or not the Illinois statute prohibited him from testifying, but based its rejection upon the proposition that it would appear that the Bankrupt, and his heirs after his death, did not apparently have any real interest in the outcome of the bankruptcy because there would be nothing left for either the Bankrupt or his heirs in view of the fact that the claims on file were much greater than the assets of the Bankrupt's estate. We do not believe that this statement of the Court is a correct statement of the applicable law of the State of Illinois.

We realize that by urging this matter upon this Court without having filed any cross-appeal, that some argument may be made that our position is inconsistent. However, we believe that our position falls squarely within the framework of the cases previously cited in this brief, that we can urge this point in support of the upholding of the judgment of the Circuit Court of Appeals, even though the Court rejected our argument, because to do so, does not in any way enlarge our rights.

It was stipulated that the Bankrupt died on August 26,

1953, prior to the hearing in this matter, and that he left him surviving a widow and two children.

Prior to the enactment of the Federal Rules of Civil Procedure there was a statute known as the *"Competency of Witnesses Act,"* 34 Stat. 618, R.S. Sec. 858, 28 USC 631, providing that the competency of a witness in the Federal Courts was to be determined by the laws of the State or territory in which the court was held. The Judicial Code Revision Act of 1948 repealed this Act and did not enact any Federal competency statute. Since the Competency of Witnesses Act which was in force prior to the Act of 1948, was applied to suits in equity, as well as actions at law, the law of the State in which the Federal Court is sitting is the criterion of competency under any of the alternatives of Rule 43 A of the Federal Rules of Civil Procedure. 5 *Moore Federal Practice*, Sec. 43.06, page 1330.31; *Collier on Bankruptcy*, 14th Edition, Vol. 2, Sec. 21.10, *Competency of Witness Other Than Spouse of Bankrupt; Wright* v. *Wilson*, 154 Fed. 2d 616, CCA 3rd 1946, Certiorari denied, 329 U.S. 743; *Potlatch Oil and Refining Co.* v. *Ohio Oil Co.*, 199 Fed. 2d 766, CCA 9th, 1952; *Lakeshore National Bank* v. *Bellance Aircraft Corp.*, 83 Fed. Supp. 795, affirmed 178 Fed. 2d 923, CCA 3, 1950.

This principle as to governing law is applicable to proceedings in bankruptcy as well as civil proceedings in Federal Court, by virtue of *Order No. 37 of the General Orders in Bankruptcy*, established by the Supreme Court of the United States on January 16, 1939, effective February 13, 1939.

Section 2, Chapter 51, Illinois Revised Statutes, Bar Association Edition, provides in part:

> "No party to any civil action, suit or proceeding, or person directly interested in the event thereof,

shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any habitual drunkard, or person who is mentally ill or mentally deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, *or as guardian or trustee of any such heir, legatee or devisee....*" (Italics ours.)

(Certain exceptions are enumerated in this statute, none of which, however, is applicable in this proceeding.)

In this proceeding William C. Dunham is sued as Trustee for the bankrupt estate of Robert L. Knetzer, who is now deceased. It was established by evidence in this proceeding that Robert L. Knetzer died, leaving heirs to his personal estate. By virtue of the foregoing statute and by virtue of these facts Respondent contends that he is a protected party under the terms of Section 2, Chapter 51, Illinois Revised Statutes, Bar Association Edition.

In the case of *Rankin* v. *Cox,* 71 Fed. 2d 56, CCA 8th 1934, the Court, in holding that a bankrupt was incompetent to testify to relevant conversations and transactions with a deceased party in view of the bankrupt's direct, legal interest in the estate, said (page 61):

"As declared by this Court in *Burton Coal Company v. Franklin Coal Company,* 67 Fed. 2d 796, 801, 'In the normal administration of a bankrupt estate any surplus remaining in custody of the trustee should go to the bankrupt.' We see no reason to doubt that the right of the bankrupt to or of his estate that may remain after the bankruptcy administration is a right or a legal matter and necessarily results in his having a direct legal interest in the bankrupt estate within the language of the Nebraska statute. (Citations omitted) The bankrupt has also the right to make composition with those creditors (Sec. 12

> Bankruptcy Act UCCA Title 11 Sec. 30) and upon confirmation of a composition, the bankruptcy proceedings must be dismissed (Sec. 12e of the Act) (USCA Sec. 30(e)) leaving the bankrupt's title to his estate unimpaired by the bankruptcy proceedings. This right also is in the nature of a legal interest in the estate."

Although authority for such an obvious proposition is probably unnecessary, we feel that the above cited case clearly shows that the bankrupt retains an interest in his estate which would, by the law of intestate succession in the State of Illinois, descend to his heirs at law upon his death.

Although there are no Illinois cases dealing with the applicability of Chapter 51, Section 2, Illinois Revised Statutes, Bar Association Edition, to a trustee in bankruptcy of a deceased person as a protected party, there are a number of decisions dealing with similar statutes in other States holding that a trustee in bankruptcy is a protected party.

In the case of *In Re Shaw*, 109 Fed. 780, District Court for the Eastern District of Pennsylvania, 1901, one F. F. Kaufman filed a claim before a Referee in Bankruptcy. The bankrupt was dead and the Referee refused to consider the testimony of the claimant in support of the items of his account. On appeal to the District Court the action of the Referee was upheld, the District Court saying at page 780:

> "The Referee was right in refusing to consider the testimony of the claimant in support of the items of his account. The bankrupt was dead, and by virtue of Section 5, cl. (2) of the Pennsylvania Statute of 1887 (P.L. 158), the witness had become incompetent to testify upon this subject. Neither had he been made competent by virtue of Section 7 of the same statute.

The Trustee did not call him for cross examination upon the items of his claim; but for examination concerning a transfer of property made to him by the bankrupt within four months preceding the adjudication and while it may be true that this transfer was made in attempted satisfaction of the claimant's account, nevertheless the examination of the Trustee did not go into the items of the claim."

The Pennsylvania statute involved was *Section* 322, *Title* 28, *Purdon's Pennsylvania Statutes*, 1936. The statute at the time of the *In Re Shaw* case was not set out in the report, but there have been no material changes in the statute since the time of the *Shaw* case. The present statute reads:

". . . nor, where any party to a thing or contract in action is dead or has been a lunatic and his right thereto or therein has been passed, either by his own act or by the act of the law to a person on the record who represents his interest in the subject in controversy, shall any surviving or remaining partner, etc." (The statute continues, holding the surviving party incompetent and makes certain exceptions not here pertinent.)

In the case of *Ray* v. *Salisbury*, 134 N.Y. Supp. 733, 1911, a bill *quia timet* was brought by Ray against Salisbury as the Trustee in Bankruptcy of John H. Ray. The premises in question were owned by Ray, who was adjudicated a bankrupt and who was insane at the time the bill was filed. Within four months prior to the filing of the petition, Ray conveyed the premises to his son, the plaintiff. The plaintiff contended that Ray's wife advanced money to improve the property on the condition that a deed be made to her, but later modified the agreement to provide that the deed could be made to the plaintiff. The bill was dismissed on the ground that the conveyance was

an unlawful voidable preference. The Court said, at page 733:

> "But the only evidence as to the making of the original agreement was given by the plaintiff's mother and because of the fact that John H. Ray was insane at the time of the trial it seems to me that she is incompetent under Section 829 of the Code to give such testimony against the trustee of her husband. *Rosseau* v. *Russ*, 180 N.Y. 116, 72 N.E. 916. Under the authority of that case she is a person through whom plaintiff derives his interest in the property 'by assignment or otherwise' and forbidden to testify as to the transaction with her husband now insane."

In the case the Court applied a New York statute to the protection of the Trustee in Bankruptcy, although the particular statute was specifically for the protection of a committee appointed by law to represent the interests of an insane person, feeling that a trustee in bankruptcy would stand in the same position.

It must be emphasized that in none of these cases was there a statute involved which specifically mentioned a trustee in bankruptcy as a person protected by the statute.

There is, of course, a practical application to the so-called "Dead Man Statute", because a Respondent, such as in the instant case, is definitely at a great disadvantage in defending a case where his bankrupt is dead, and a petitioner can say almost anything without fear of contradiction. We sincerely believe that Petitioner was not a competent witness in his own behalf, and if his evidence is stricken, of course there is nothing in the record for his theory of the case whatsoever.

CONCLUSION

We respectfully submit that the ultimate judgment reached by the Circuit Court of Appeals was correct and that the judgment there entered for the Respondent was correct and should be affirmed by this Court.

Respectfully submitted,

G. W. HORSLEY
L. H. LENZ
408 East Adams Street
Springfield, Illinois
Attorneys for Respondent